United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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74-1282

B/P/S

To be argued by
STEPHEN M. BEHAR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1282

UNITED STATES OF AMERICA,

Appellee,

—against—

HORSUN HOWARD,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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UNITED STATES COURT OF APPEALS
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Preliminary Statement

Horsun Howard appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Bruchhausen, *J.*) entered October 8, 1971. The judgment followed a jury verdict of guilty on two counts of an indictment charging him with violations of 18 U.S.C. § 2113(a) (bank robbery) and 18 U.S.C. § 2113(d) (bank robbery with a deadly weapon), respectively. Appellant was sentenced to fifteen years imprisonment on each count, sentences to run concurrently. Appellant is presently serving his sentence.

The indictment, returned February 25, 1971, also charged one Fred Fernandez with the armed bank robbery. Prior to the commencement of the trial a related information charging one Jerome L. Reide with two violations of 18 U.S.C. § 5031 (juvenile delinquency based upon the bank

robbery and the bank robbery with the deadly weapon) was consolidated with appellant's indictment for purposes of trial. Following a pretrial hearing and prior to the selection of a jury, however, the Reide case was severed.* At the close of trial the jury was unable to agree as to appellant's co-defendant Fred Fernandez and a mistrial was declared as to him.**

On August 15, 1972 the United States District Court for the Eastern District of New York (Bruchhausen, *J.*) denied appellant's application pursuant to 28 U.S.C. § 2255 to set aside his conviction based upon his claim that he was deprived of his right to appeal by virtue of the incompetency of his counsel.*** On February 19, 1974 this Court reversed Judge Bruchhausen's order and granted appellant leave to file this out of time appeal. *United States* v. *Howard,* 492 F.2d 1237 (2d Cir. 1974).

On this appeal appellant claims reversible error arose from: (1) the Court's failure to charge the jury on the essential elements of the crime, notwithstanding defense counsel's failure to object; (2) the Court's failure to charge the jury on the dangers of misidentification; (3) the Court's failure to exclude the in-court identification of appellant; (4) the Court's denial to defense counsel of an opportunity

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* Jerome L. Reid was convicted on November 30, 1972 under Docket Number 71 Cr. 162.

** Fernandez was convicted at two later trials but, both convictions were reversed on appeal. *United States* v. *Fernandez* (I) 456 F. 2d 638 (2d Cir. 1972); *United States* v. *Fernandez* (II), 480 F.2d 726 (2d Cir. 1973). On December 4, 1973, Judge Weinstein, United States District Court, Eastern District of New York, dismissed the indictment against Fernandez. The Government has appealed that order; *United States* v. *Fernandez, appeal docketed,* T-3050, 2d Cir., argued, September 13, 1974, decision reserved.

*** Following trial appellant replaced his trial counsel with new counsel who was to represent appellant at sentencing and on appeal. It was the allegedly incompetent advice of this latter counsel, not to appeal his conviction, that formed the basis for appellant's application to set aside his conviction.

to utilize a peremptory challenge to the seating of an alternate juror; and (5) the Court's denial of appellant's motion for a mistrial or an evidentiary hearing, based upon his claim that the jurors viewed his arrest in the lobby of the courthouse on an unrelated charge during the course of the trial.

Statement of the Case

A. The Robbery

At 2:00 p.m. on December 24, 1970, appellant and three other bank robbers entered the branch of the Federal Savings and Loan Association located at 44-04 Kissena Boulevard, Flushing, New York (529, 535, 580).* Appellant and one of his accomplices crossed the public area of the bank to the tellers' counter (638). There, the accomplice, gun in hand, jumped onto the counter, ordered the employees and customers to "freeze" and announced the robbery (582). Appellant, also with pistol in hand, joined his accomplice behind the tellers' counter and proceeded to empty the cash drawers (583, 594-95, 642). The robbery lasted five minutes (597, 617, 630) primarily because appellant and his accomplice were unable to open the cash drawers until they forced the victim tellers to help them (582-85, 629-30, 728). Once the drawers were opened, appellant and his accomplice each emptied two of them (596, 722). Appellant was further delayed by his inability to unlock the door separating the tellers' area and the public area. Once the door was open, appellant rejoined his companions in the public area, fleeing the bank through the front door (596, 722). Appellant and his accomplices stole $14,696.00 from the Federally insured bank (537, 576).

During the course of the robbery, appellant, who wore no mask or disguise, had been closely observed by at least

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* Page numbers in parenthesis refer to the transcript of the identification hearing (2-502) and of the trial (503-987).

five bank employees who had recently been instructed on how to make careful observations of suspects during the occurrence of a bank robbery (536, 552, 585, 605, 630-31, 653, 707, 722).

Miss Dilia Gomez, assistant to the manager, observed appellant's face throughout the robbery (581, 585). While appellant was emptying the cash drawers, he was only five to six feet from her (584, 594-95). Miss Gomez had ample opportunity to observe that appellant was approximately five feet four inches tall, about 160 pounds (598), and had a grinning, heavy set face (606). She noted that he did not wear a hat or cap but did wear a light olive green leather jacket and a scarf or sweater (597). She also saw the black, long barreled gun he carried (598-99).

Mrs. Josephine Denisco, teller, observed appellant for one minute from a distance of four to five feet (631). In that period of time, Miss Denisco was able to observe that appellant was heavy set, black, five foot six inches tall, that he wore a scarf, and carried a black pistol with a long barrel (636-38).

Miss Barbara Gerondel, a second teller, stared at appellant for "more than a minute" (658) while he emptied the cash drawers and kept his gun leveled at her (659). This exposure allowed Miss Gerondel to also observe that appellant was a heavy, black male, wearing an olive green jacket (663-64).

Mrs. Louise Cogan, assistant manager of the bank on that Christmas Eve, recalled that appellant, while emptying the tellers' drawers held a number of female bank employees at gunpoint (708). She also observed a short, heavy set, black male in his early twenties wearing a jacket (713).

Miss Theresa Karlsson,* bank teller, was a fifth bank employee threatened by appellant's gun during the course of the robbery (720-21). Miss Karlsson also observed a short heavy set, black male, in his early twenties, wearing a green jacket (725-27, 729).

Following the robbery, all the witnesses described the appellant to Agents of the Federal Bureau of Investigation.

In addition to the five women who saw appellant during the bank robbery, the bank surveillance camera, recorded portions of the startling events in the bank that afternoon, including the movements of appellant (556, 571).

B. The Photo Identification Issue**

Armed with the photographs from the surveillance camera, Special Agents of the Federal Bureau of Investigation, on January 18, 1971 were able to identify appellant as one of the bank robbers. On that date a warrant for his arrest was issued by United States Commissioner Vincent A. Catoggio. Thereafter, on February 2, 1971, appellant was arrested (15).

Following appellant's arrest, FBI Special Agent Lawrence Sweeney visited the First Federal Savings and Loan Association. In a private room in the back of the bank Sweeney displayed a set of six photographs to each of the five bank employees who had been in closest contact with

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* When Miss Karlsson testified at trial the court reporter misspelled her name as "Carlson".

** Prior to trial appellant moved, *inter alia*, for the suppression of his anticipated in-court identification.

Agent Sweeney visited the bank on two occasions. On February 10, 1971 he interviewed Miss Gomez, Mrs. Denisco, Miss Karlsson and Mrs. Cogan (16). On March 2, 1971, following appellant's indictment but prior to his arraignment, Agent Sweeney interviewed Miss Gerondel (199).

appellant during the robbery. All the photographs, including appellant's, were black and white single frame photographs of black males. The photographs were shown face up and the witnesses were not permitted to look at the back of the pictures until after having made a identification. Sweeney explained that in gathering pictures, other than appellant's, for inclusion in the photo spread, some of his primary concerns were to include pictures of medium complexioned black males, with medium length afro hair styles (76-76). Additionally, Sweeney limited the pictures to poses that only showed full frontal views of all or part of the subject's upper torso (77-78).

Sweeney was unsuccessful in his efforts to obtain pictures of other people wearing sunglasses (79). Though Sweeney had access to a picture of appellant without sunglasses, it was not as good a likeness of appellant as the pictures which was included in the photo spread (85).*

All five bank employees uniformly testified that, at the showing of the photo spread, the pictures were presented in a random order, that other witnesses were not present, that there had not been previous discussions of the photo spread with other witnesses, and that prior to their selection of the appellant's picture, Agent Sweeney's sole comment was that he wished them to look at some pictures to see if they could identify one of the robbers (159, 198-99, 238-39, 257, 315-16, 357-59, 360-61).**

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* The photo spread which included appellant's photograph will be available for this Court's inspection at the oral argument of this case.

** Sweeney did not prompt the witnesses and only asked them if they could identify a photograph as depicting one of the men who robbed the bank on Christmas Eve 1970. Each of the witnesses selected the picture of the appellant as that of the second bank robber to come behind the teller's counter (602, 609, 631-32, 654-55, 709, 715, 723, 727). Moreover, prior to their viewing the picture spread none of the witnesses recalled having been shown the bank surveillance photographs (186, 229, 253, 324-26, 369, but see testimony of Sweeney, 130, 140).

At the close of the hearing the Court denied appellant's motion, finding the photographic identification proceedings not so inpermissibly suggestive so as to give rise to a substantial likelihood of misidentification (501-02).

C. The Trial

(i) Jury Selection

Following the denial of appellant's motion, the selection of a jury commenced. The Court permitted counsel to examine each prospective juror (V4)* and the jury selection process consumed more than four hours (520). After the challenges to the regular jurors were exercised and before the selection of alternates, one of the regular jurors volunteered that if the case went on for a week or so, as one defense counsel had predicted, she, the juror, would not get paid by her employer for time served beyond five days (V85). The Court explained that such a delay was unlikely and ruled the question of the juror's potential prejudice closed (V86). Two alternate jurors were then seated (V86). The alternates were questioned by counsel. Appellant's counsel then turned to the aforementioned regular juror and started to question her about the potential loss of pay that could be caused by jury service (V93). Appellant's co-defendant's counsel attempted to join in this questioning despite the Court's ruling (V93-94). The Court then inquired if the jury was satisfactory. Counsel did not reply in the negative but requested to be heard. The Court then swore the jury (V94) and recessed until the next day.

The following day, after raising a series of objections, some of which were otherwise addressed to the selection of the jury (509-514), appellant's co-defendant's counsel finally claimed that she had been denied the opportunity to chal-

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* Page numbers in parenthesis, preceded by the letter "V", refer to a separate volume of the transcript devoted exclusively to the selection of the jury.

lenge the alternates. Later, appellant's counsel noted that she would join in co-counsel's objections, wtihout specifying which objection (517).

(ii) The Evidence

The Government first called to the stand Vincent O'Connor, manager of the victim bank (529). O'Connor testified to the Federally insured character of the bank (537), to the special identification training previously given to the employees (535-36, 552, 563) and to the activation of the surveillance cameras, by at least five employees, during the robbery (556, 571). O'Connor then introduced the surveillance photographs showing a front view of appellant as he left the bank (571).* In addition, a bank auditor testified to the amount of money taken during the course of the robbery. The five female bank employees who identified appellant, then testified as to appellant's participation in the bank robbery and their opportunity to observe him (*supra*, pp. 4-5). These employees further testified about their out of court identification of appellant. The cross-examination of each of these witnesses was exhaustive and devoted entirely to the identification question (592-615, 635-649, 655-665, 711-19, 724-29).

Appellant's defense case consisted of a brief examination of Agent Sweeney (820-26) and the submission, by stipulation, of F.B.I. reports of interviews of Mrs. Denisco, Miss Gerondel, and Miss Karlsson (855-59).

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* These surveillance photographs will be made available at oral argument.

ARGUMENT

POINT I

There was no reversible error in the District Court's charge.

Altnough no exception was taken by defense counsel to any portion of the charge here complained of, appellant now claims that, by reason of "plain error", reversal of his conviction is required. Appellant Howard bases his claim on the failure of the District Court to instruct the jury fully on the essential elements of the crimes with which he was charged, namely bank robbery under 18 U.S.C., 2113(a) and placing the lives of employees and persons present in the bank in jeopardy during the course of the bank robbery by the use of a dangerous weapon under 18 U.S.C., 2113(d). However, upon a reading of the District Court's charge as a whole and viewing it in relation to the evidence adduced during the trial, appellant's argument should not be accepted as making out a case of plain error.

While the portion of the charge dealing with the Sections 2113(a) and (d) concededly did not elucidate the meanings of certain phrases therein as would usually be required, their omission did not affect the substantial rights of appellant in the particular factual setting of this case. During the trial, the evidence established to a certainty that on Christmas Eve of 1970, four men, at least two of whom were brandishing pistols, brazenly and without disguise, entered the Kissena Boulevard branch of the Federal Savings and Loan Association, ordered the employees and customers of the bank to "freeze", vaulted the tellers' counter and rifled the cash drawers of approximately $15,000 which money was insured by the Federal

Savings and Loan Insurance Corporation. The facts of this bank robbery were not contested at trial and are not challenged on this appeal.* Indeed, the only issue at trial was that of the identity of the Christmas Eve bandits.

Identity was the key and only issue for the jury's determination. This is not to say that the correct form of charge in this case would not have included an explanation of the bank's insured status, that the money taken was in the custody, control, management or possession of the bank, and that it was taken from employees of the bank by force, violence and intimidation by the use of pistols thereby putting the lives of those assaulted in jeopardy. However, under the simple facts of this case, such a charge, although certainly preferable, would have served only to reiterate that which was obvious. To urge that the omission of such a portion of the charge should be held to raise the entire charge to the level of reversible error is not warranted here.

Significantly, appellant makes no showing of exactly what substantial rights he was deprived of by this omission. His experienced trial counsel, who did join in other unrelated objections to the charge (954), did not even see fit to object on this ground. Appellant has provided insufficient justification for this Court's "exercising [its] extraordinary discretionary power to consider objections not adequately brought home to the trial court." *United States* v. *Lease,* 346 F.2d 696, 703 (2d Cir. 1965). Appellant merely makes a naked conclusion of plain error and attempts to support his claim by citing *United States* v. *Fields,* 466 F.2d 119 (2d Cir. 1972) and *United States* v. *Clark,* 475 F.2d 240 (2d Cir. 1973). These cases dealt with particularly confusing and misleading charges, a situation which is not claimed in the instant case and does not exist.

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* During summation trial counsel for appellant and his co-defendant admitted the occurrence of this robbery (909, 875-76).

Similarly, appellant's reliance on *Byrd* v. *United States,* 342 F.2d 939 (D.C. Cir. 1965) is misplaced and not instructive. Contrary to appellant's statement (Appellant's Brief pp. 13, 14), *Byrd, supra,* did not involve a bank robbery, but dealt with the robbery of an individual. The case was prosecuted under the District of Columbia Code and it involved the question of the Trial Court's failure to charge on the common law specific intent to steal.

In the instant case the jury was instructed on the element of specific intent it had to find against appellant. The Court defined the words "knowledge" and "willfulness" and explained to the jury that these were the ". . . essential elements of the alleged crimes" (945). No mention of this portion of the charge is made by appellant. Further, appellant seeks to justify the fact that no specific exceptions were made at trial to the portion of the charge now complained of by simply stating that what he calls the trial court's "glaring omission" (Appellant's Brief p. 11) amounts to plain error. He fails to mention that a timely objection would have enabled the District Court to correct any deficiency now claimed to warrant a reversal. Such a supplemental charge would have eliminated any defects in the form of the charge. The Court could then have recited those facts which were virtually conceded and which the jury had to find on the evidence presented in the form of elements of the crimes. Free from any error of form, the jury would then have been instructed, as it was, as to the only issue, whether appellant and his co-defendant were in fact the men who committed the robbery.

The verdict in this case makes clear that the jurors understood this issue and were able to weigh the evidence against each defendant separately. The jury found appellant guilty and could not agree as to the co-defendant Fernandez. To claim under the facts herein that the jury could have found that the appellant Horsun Howard was in fact one of the bank robbers and yet not have found

beyond a reasonable doubt that he used force, violence and intimidation to steal federally insured money under the control and custody of the bank, by threatening the lives of its employees and customers with a gun, is simply untenable. If the robber in the bank were appellant, he was engaged in a precise business. There could be no mistake about his purpose or the manner and means in which he and his confederates carried out their objective. Regardless of what was omitted from the charge, the practical reality facing the jury in this case was clear and uncomplicated. If the jury found beyond a reasonable doubt that on Christmas Eve 1970, Horsun Howard was the robber who entered the Federal Savings and Loan Association on Kissena Boulevard brandishing a gun and took money from the cash drawers of the bank, then he was guilty.

There were no technical, complex jurisdictional issues presented for the jury's determination in this case; no varying degrees of specific intent necessary to be found for example, between a finding of guilt for a substantive offense and conspiracy charge. The simplicity of the facts and clarity of the issue to be decided were illustrated both by appellant's trial counsel and his co-defendant's trial counsel as they devoted their entire summations to the issue of identity. No amount of definition or explanation by the trial court as to the federally insured nature of the stolen money, the custody of the money stolen, and the manner and means employed to steal it, would have affected, nor could have affected, the jury's verdict or rights of the appellant in this case. The charge here did not provide these explanations and definitions, and in that sense is lacking. However, this shortcoming does not *ipso facto* raise the charge given to the jury to the level of a manifest miscarriage of justice, nor does it work an obvious unfairness to the appellant which would require a reversal. See, *United States* v. *Schabert,* 362 F.2d 369 (2d Cir.), *cert. denied,* 385 U.S. 919 (1966).

POINT II

The absence of a charge on the dangers of misidentification did not constitute reversible error.

Appellant does not, indeed cannot, cite a single authority for the proposition that a "dangers of misidentification" charge must be given when requested by a defendant. In an effort to convert this Court's latest rejection of that proposition to his own ends, appellant hinges his argument on a single phrase in the decision in *United States* v. *Evans*, 484 F.2d 1178, 1188 (2d Cir. 1973), to wit: We hold that under the circumstances of this case, particularly the full opportunity afforded to develop all the facts relevant to identification of the defendant *and the careful and accurate instructions to the jury*, it was not error for the trial judge to refuse to give an additional charge regarding identification. *United States* v. *Evans, supra,* 484 F.2d at 1188 (emphasis added). Appellant would have this Court ignore the full breadth of its decision in that case.*

Even *Evans* there was greater justification for requiring a "dangers of misidentification" charge than exists in the present case. In *Evans*, unlike the present case, the identifications were not positive. Only one of the three witnesses therein was a victim teller, the rest were bystanders, bank customers, *Id.* 1179-80. At a pretrial photo spread all three witnesses were only able to narrow their identification to two photographs, one photo of Evans and one of someone else, saying that the robber was one of these two men. The second photograph selected by each witness was not even

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* *See, Evans, supra* at 1187 where Judge Lambard, citing *United States* v. *Barber*, 442 F.2d 517, 526 states:

> There is also "formidable precedential authority which holds that it is necessary neither to instruct the jury that they should receive certain identification testimony with caution, nor to suggest to them the inherent unreliability of certain eyewitness identification."

of the same man. *Id.* at 1180. Prior to the pretrial hearing, one of the witnesses was shown surveillance pictures of the bank robbery she had witnessed, while the other two witnesses were shown surveillance pictures of other bank robberies wherein it was believed Evans was the robber. *Id.* Lastly, during trial, one witness' inability to make an in court identification of the defendant during the morning session was cured during the afternoon session, following a luncheon recess showing of the surveillance film to that witness. *Id.* at 1181.

Contrast the facts in *Evans* to the case at bar, where the five victim witnesses have never hesitated in their identification of the appellant.

The choice of whether or not to give the requested charge is within the discretion of the trial court. Again, as this Court stated in *Evans*:

> [E]ven those courts which endorse the use of a specific charge would allow the trial judge wide latitude in choosing or declining to employ it, or they would look to other circumstances, such as the scope and adequacy of defense counsel's cross-examination and summation, to justify its omission (Citations omitted). *Id.* at 1188.

In view of the extensive cross-examination on,* and argument about,** the identification issue, the omission of the charge could not constitute an abuse of the Court's discretion.

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* See discussion on length of cross-examination on identification issue p. 18, *infra*.

** Appellant's trial counsel devoted her entire summation to this issue (906-917).

Additionally, while the trial in the *Evans* case followed this Court's advice that a "dangers of misidentification" charge should be given when properly drafted and requested, *United States* v. *Fernandez* (I), 456 F.2d 638, 644 (1972) appellant's trial preceded that issuance of this Court's guidance.*

Therefore, it must be concluded that if the circumstances of *Evans* did not warrant the conclusion that the lack of the requested charge constituted reversible error, clearly such a conclusion is not warranted on the facts of the present case.

POINT III

The in-court identifications of appellant were properly admitted.

Appellant next contends that the in court identification should have been excluded because of impermissibly suggestive pretrial procedures utilized by the government. In determining the admissibility of appellant's in-court identification the initial inquiry must focus on whether or not the out of court (photographic) "identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (*Simmons* v. *United States,* 390 U.S. 377, 384 (1968)).

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* *Fernandez* (I), *supra*, was, of course, the appeal of the retrial of appellant's co-defendant. Evans' conviction on March 27, 1973, *Evans, supra,* 484 F.2d at 179 followed the *Fernandez* (I) opinion by one year and one month.

(i) The Pre-trial Identification.

While the subjects of the photographs used in the photo spread did differ from appellant in three respects,* appellant cannot be heard to claim that the circumstances surrounding his photographic identification by any of the five witnesses were suggestive. Agent Sweeney interviewed each of the witnesses separately. He presented all the pictures in a like random manner and in no way indicated which picture should be chosen by the witness. The pictures themselves all showed the same single pose of medium complexioned black males.

Appellant's claim that the presence of sunglasses only in his picture automatically rendered the pretrial identification procedure impermissibly suggestive is controverted by the testimony of the witnesses. Mrs. Gomez, Mrs. Denisco, and Mrs. Cogan all stated that they did not recall whether or not appellant wore sunglasses during the robbery (183, 248, 714).

(ii) The In-Court Identification

Even if one were to assume that the pre-trial identification procedure was impermissibly suggestive, it must be remembered that though appellant moved for the suppression of the in court identification testimony, he never moved for the suppression of the testimony of his pre-trial identification (503),** nor did he object to the receipt of

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* Concededly appellant appeared to be the heaviest subject photographed, the only one wearing sunglasses, and the only one wearing a leather coat. However, three of the witnesses stated that the sunglasses were so unimportant that they did not even remember if the appellant wore them in the bank. Additionally, the leather coat appellant wore during the robbery was light green, while the one he is wearing in the photo spread picture appears to be dark brown or black.

** See appellant's pre-trial motions April 21, 1971.

that testimony at trial. Therefore, the only question raised by appellant is, did the allegedly impermissibly suggestive pre-trial identification procedure give rise to a substantial likelihood of irreparable misidentification at trial.* The answer to question must be the negative, in view of the extraordinary opportunity that the five bank employees had to observe appellant during the commission of the bank robbery. *Neil* v. *Biggers*, 409 U.S. 188 (1972); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973).

All the witnesses utilized a substantial opportunity to view appellant during the course of this bank robbery. they viewed appellant in a well lit bank for a period of up to five minutes. At times, appellant was between four to six feet from the witnesses Gomez and Denisco. The opportunity to observe by the witnesses here was clearly comparable to that enjoyed by the witnesses in *United States* v. *Fernandez* (I), 456 F.2d 638, 642 (2d Cir. 1972).

All the witnesses evidenced an exceedingly high degree of attention towards the appellant during the course of the bank robbery. Their recent training in this area was evidenced by their ability to describe the appellant after the robbery. The high degree of consistency throughout the descriptions of all five witnesses illustrates their efficient utilization of the excellent opportunity to observe appellant (597-99, 606, 636-38, 663-64, 713, 725-27, 729).

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* The selectivity of appellant's motion reflects his tractical decision. Apellant obviously reasoned that a motion to suppress both identifications could result in an order suppressing only the pre-trial identifications. If that were to occur appellant could have been denied the opportunity to argue to the jury that the allegedly tainted pre-trial identification was the sole basis for the in court identification; an opportunity grasped by appellant's counsel in her summation (908-915).

As with the primary witness in *Gonzalez* v. *Zelker*, *supra*, at 801, the robbers were close to the witnesses, the witnesses were not casual bystanders but victims threatened with weapons, the light was good and their attention was focused upon the robbers. The witnesses did not evidence the slightest degree of uncertainty during the pre-trial identifications or more importantly, during the in-court identifications.

The length of time between the robbery and appellant's identification by four of the witnesses was six weeks. The identification by the last witness was three weeks later. The first four identifications followed appellant's arrest by only eight days, and at that time the agents were investigating another bank robbery allegedly committed by appellant.*

Furthermore, the cross-examination of the eye witnesses and the agent at the pretrial hearing regarding the identification, consumed approximately one hundred pages of record; the cross-examination on this issue at trial consumed an additional seventy-two pages of testimony.** As noted in *United States ex rel. John* v. *Casscles*, 489 F.2d 20, 26 (2d Cir. 1973), "An important factor for consideration is the extent of cross-examination by defense counsel, so that all the facts concerning any possible misidentifications are before the jury." In *Casscles* the suffi-

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* On February 25, 1971 appellant was also indicted—for the January 21, 1971 armed bank robbery of the Astoria Federal Savings and Loan Association; 71 CR. 217. Additionally on June 24, 1971 appellant was indicted for the February 1, 1971 filing of a false statement in connection with the purchase of a firearm.

** Including seven pages of direct testimony by Agent Sweeney when called by appellant as his witness.

ciently extensive cross-examination covered more than forty pages.*

In sum, though the pre-trial identification procedure may have been suggestive, even if impermissibly so, in view of the totality of the circumstances there did not arise a substantial likelihood of misidentification. *See, Casscles, supra.*

POINT IV

Reversible error did not infect the selection of the jury nor its service.

Intertwining two separate contentions respecting the selection and service of the jury, appellant urges that the judgment of conviction must be reversed. Appellant contends that the District Court denied him the peremptory challenge to one of the two alternate jurors in violation of the express provisions of Rule 24(c), F. R. Crim. P.,

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* As to appellant's claim that the tainted identification was reinforced by the prosecutor's showing the witnesses the photo spread prior to trial. Justice Stewart's comment in his concurring opinion in *United States* v. *Ash*, 413 U.S. 300, 325 (1973), is most appropriate.

"Preparing witnesses for trial by checking their identification testimony against a photographic display is little different, in my view, from the prosecutor's other interviews with the victim or other witnesses before trial. See *United States* v. *Bennett*, 409 F.2d 888, 900. While these procedures can be improperly conducted, the possibility or irretrievable prejudice is remote, since any unfairness that does occur can usually be flushed out at trial through cross-examination of the prosecution witnesses. The presence of defense counsel at such pre-trial preparatory sessions is neither appropriate nor necessary under our adversary system of justice to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witness against and to have effective assistance of counsel at the trial itself." Citing *United States* v. *Wade*, 388 U.S. 218, 227 (1967).

and that the denial of that right to challenge cannot be dismissed as harmless because one of the alternate jurors eventually deliberated on the verdict in place of one regular juror. In his related contention, appellant urges that the incident which gave rise to the replacement of the regular juror, his arrest on another separate charge in the courthouse lobby, was never sufficiently examined by the District Judge. In brief, the Government submits that the inadvertent failure of the District Court to accord appellant a peremptory challenge was never the subject of a timely, or even belated objection by appellant's counsel. Moreover, the record shows that the seating of the alternate juror was an event due solely to the assertion by counsel for appellant that the jury, and particularly the juror who was replaced, had witnessed appellant's arrest in the courthouse lobby; an assertion which was later found by the District Judge, following appropriate inquiries, to be without foundation in fact.

While Rule 24(c) clearly provides that a defendant shall be allowed one peremptory challenge as to the alternate jurors, it is equally clear that, in order for a denial of that right to be considered upon appeal, there must be timely objection made at the trial by defendant's counsel. *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341, 361-362 (1962); *United States* v. *Klock,* 210 F.2d 217, 220 (2d Cir. 1954); *Holmes* v. *United States,* 134 F.2d 125, 129 (8th Cir.), *cert. denied,* 319 U.S. 776 (1943); *United States* v. *Kahn,* 340 F. Supp. 485, 491 (S.D.N.Y. 1971), *aff'd,* 472 F.2d 272 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973). Challenges are timely only if made before the jury is sworn. See, *Moore* v. *United States,* 432 F.2d 730, 740 (3d Cir. 1970); *Cf. United States* v. *Woodner,* 317 F.2d 649, 651 (2d Cir. 1963). Concededly, no timely objection was made in this case. Appellant, however, urges that his counsel would have made the objection had he been permitted to do so by the District Judge. The series of events which underly that claim occurred at the end of the jury selection and at the beginning of the next trial day.

As the selection of the first 12 jurors was drawing to a close, juror number four (Mr. Denino) volunteered that he would not be able to stay for the entire trial. He alluded to a previous statement which had been made by counsel for Fred Fernandez (Mrs. Piel) that the trial would last for a week or more and that because his employer would not pay him for more than five days of jury service, he would be unable to serve for the entire course of the trial. After subsequent questioning it was brought out that Mr. Denino had already served three days of jury duty. Following some brief colloquy the District Judge directed that the alternate jurors be called. At that point, juror number eleven stated that he also would like to be excused from jury service because he worked for a power company and that if he were required to serve too long on the jury his absence from work "might affect power supply to the entire eastern coast" (V 85, 86, 93). Judge Bruchhausen responded, "I can not believe it" (V 86), and directed the jury selection to proceed. Thereafter, Mr. Wolfman, and Mr. Contino, the alternates, were briefly questioned by the Assistant United States Attorney, by counsel for Fernandez, and finally by counsel for the appellant who directed her questions to both alternates (V 87-93). At the close of her questioning of the alternates counsel for appellant turned to Mr. Denino and asked: "Mr. Denino, may I ask you how many of your five days you have already had?" When Mr. Denino responded that he was already into his third day of service, counsel for appellant continued: "So you will be paid for two more" (V 93). When Judge Bruchhausen indicated that the subject of Mr. Denino's service as a juror had already been closed, counsel for Fernandez continued to press the point. The following then occurred:

> The Court: I have passed on that matter. Let us go on. I have passed on that question.
>
> Mrs. Piel: The defendant is going to have a

juror who is possibly going to be prejudiced against him.

The Court: I will take care of that situation if the time comes. Proceed.

Mrs. Piel: I will like to be heard before the juror is sworn in. May I approach the bench on the question?

The Court: Proceed.

Mr. Schlam: I have no further questions, your Honor.

The Court: Is the jury satisfactory?

Mrs. Piel: I would like to be heard.

Mrs. Beeler: I would also, your Honor.

The Court: Members of the jury, rise and raise your right hand.

(Whereupon, the Clerk of the Court duly administered the oath to the jurors and the jury was duly empanelled.)

The Court: You may be seated and I will ask you to return at a quarter after ten tomorrow morning into the jury room. The jury room is right at the left here as you go in. You may now retire until a quarter after ten tomorrow morning and do not discuss the case with anybody in the meanwhile.

(Whereupon, at 5:45 o'clock p.m. the trial was adjourned to the following day) (V 93-94).

* * * * *

On the next trial day (June 24, 1971), counsel for Fernandez immediately began to press several motions Upon the Court's attention. Thus, she moved to dismiss the indictment (509), renewed her motion to suppress the identification testimony (509), and renewed her motion to suppress evidence which had been taken from her client's house (510). Counsel for Fernandez then stated that she had an omnibus motion for a mistrial. The first ground

she stated was that, prior to the impanelling of the jury, she was not given the opportunity ot challenge the jury on the ground that the "selection process was discriminatory with regard to race and with regard to age" (510). Counsel for Fernandez also urged a mistrial because her client had been prejudiced in the manner in which the Court had allotted the peremptory challenges to the two defendants (511-513). Finally counsel for Fernandez stated as follows:

> I further wish to challenge the entire procedure in that there was no peremptory challenging offered with regard to alternate jurors as provided by Rule 24 (b) [sic] and your Honor swore in the Jury after you asked if the Jury was satisfactory, and you received no answer whatsoever (514).

At no time during the foregoing proceedings did appellant's counsel interject or otherwise indicate that she joined co-counsel in her motions. Nevertheless, following an extended colloquy concerning the second motion for a mistrial made by Mrs. Piel, counsel for appellant stated:

> I would like to join in Mrs. Piel's motion. I agree with Mrs. Piel's version of the facts, except that the Defendant Howard did have five challenges and took five, as opposed to four for Mrs. Piel (517).

At no time thereafter did counsel for appellant state that she had intended to challenge one of the alternate jurors or that the alternate jurors were unsatisfactory by reason of cause.* Moreover, counsel for appellant never stated that she joined in Mrs. Piel's motion with regard to the alternate jurors and much less that she had intended to make such a motion prior to the swearing of the jury.

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* The voir dire of the two alternates hardly shows any obvious reason why counsel for the defendants would challenged them peremptorily (U. 87-83).

Finally, it is plain from this order of events that the contention regarding the denial of rights under Rule 24(c) was only made as an afterthought and not because the claim was cut off the night before.*

Thus timely objection was not made by either of the attorneys before the jury was empanelled. *Moore* v. *United States, supra.* And the record of the following morning shows clearly that the defendant's contention, that such a claim was not timely made because the judge refused to entertain it, is meritless. Consequently, the defendant waived his objections to any violation of Rule 24(c) and thus it is not appropriate for any claims under it to be considered at this time.

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* It should also be noted that it is not clear that the Court prevented the attorneys from making timely objection. At the point when the judge asked if the jury was satisfactory (V 94) he had tried already several times to cut-off both defense lawyers from continued dispute regarding the possible prejudice of juror Number Four (Mr. Denino), an issue he had already decided. When Mr. Piel responded to his question with "I would like to be heard" and Mrs. Beeler with "I would also . . ." the trial judge had every reason to believe that the two attorneys were attempting to continue the argument regarding juror Number Four which he considered fruitless. Had appellant's attorney intended to make a timely objection, when the judge asked if the jury was satisfactory, a clear "No" on her part, followed by her request under Rule 24(c) would have put the judge clearly on notice of her new objection at a time when the error could have been corrected. In any event, if the violation of Rule 24(c) was truly on Fernandez' attorney's mind at that point, one surely would have expected her to have raised that contention immediately upon the departure of the jury for the day, rather than waiting to make her contention as the sixth order of business the next day. In short, it is painfully obvious that defense counsel was not cut-off from making a timely motion but merely failed to do so as the possibility of such a claim did not occur to her until that evening.

(2)

It is self-evident that, had no alternate juror joined the jury in the rendering of its verdict, any claim raised under Rule 24(c) would be patently frivolous. The claim is possible, however, because one alternate juror (Mr. Wolfson) was seated among the petit jurors (697). Following, are the events which gave rise to the seating of the first alternate juror.

Sometime shortly after the end of the proceedings on June 24, appellant was arrested by United States Marshals in the lobby of the Courthouse on totally different Federal charges (684). According to appellant's counsel, who stated that she was a witness to the event, "the arrest took place just as everyone from the Courtroom and trial was walking out downstairs. It happened just as Mr. Howard walked out of the elevator" (686).* Prior to the next day's (June 25) proceedings, appellant's counsel advised the Assistant United States Attorney who was trying the case (Peter Schlam) and the Chief of the Criminal Division (Anthony Lombardino) that "she was in the vicinity and she saw Juror No. 2 in close proximity to the Marshal at the time of the arrest" (685).** While expressing no

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* In the Eastern District Courthouse, the elevators are located within a separate vestibule which opens very nearly into the main lobby area where the staircase is located. The elevator vestibule is visually inaccessible to someone on the staircase and becomes partially visible only when one moves further from the staircase into the lobby. At no place in the lobby can the elevator vestibule be fully viewed. The relevance of the foregoing description is somewhat equivocal because at a later point in the trial defense counsel insisted that appellant was arrested as he was descending the staircase (977-978).

** Counsel for appellant was quite sure that juror number two saw the incident:

> "Mr. Lombardino: Will your Honor excuse Juror No. 2, because that is the one that counsel is certain saw the incident.
>
> Mr. Schlam: I am not sure she is certain.
>
> Mrs. Beeler: I am" (688-689).

knowledge of what juror number two may or may not have seen, Lombardino, apparently on defense counsel's representation, stated that the Government would consent to excusing that juror "and putting in her place instead an alternate juror" (685). Whereas counsel for both defendants sought a mistrial (687), the court—relying on counsel's representation—adopted the course suggested by Lombardino of excusing juror number two (690). That decision by the Court, however, was reached before there was any confirmation that juror number two had, in fact, seen appellant arrested.* Suffice it to say that when juror number two, a young lady, appeared before the Court shortly thereafter, she stated that she had not witnessed any incident the previous day although she had said "good evening" to appellant's counsel (693-694). In all events, the Government stood by its previous agreement with the defense and, thus, after appellant's counsel stated: ". . . we would like her to be excused", the Government consented (695).**

While the defense strategy which led to the seating of the alternate juror as a regular juror casts a further pale on appellant's claim under Rule 24(c), the significance of that incident is more closely aligned with appellant's second contention respecting the inquiry of the entire panel undertaken after the verdict was returned. Appellant claims

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* Prior to the time when juror number two was called before the Court, Judge Bruchhausen suggested that she be asked if she saw the incident. Counsel for appellant, however, stated: "I am not consenting to any questioning" (690).

** The record is clear that, had the Government pressed the the point, the Court would have allowed the juror to continue. Indeed, that was the predisposition of the Court. Thus, after Judge Bruchhausen had learned that juror number two had witnessed no incident, contrary to defense counsel's representations, he stated: "I've heard enough. You [the juror] may return to the jury room. We will proceed to trial" (694).

that the Court's inquiry as to whether any jurors had witnessed his arrest was deficient.* This claim is frivolous.

When the inquiry was made (980-983), the responses of the jury members made it clear that none of the jurors knew what had taken place. Judge Bruchhausen asked: "Did any juror observe an incident as to the defendant Horsun Howard on the late afternoon of Thursday, June 24th after the jury had been selected and left the building?" (981). The only juror who had seen anything at all did not have any idea what it was all about. And, in fact, she was referring to a commotion "in the back of the courtroom" and in the hallway (982).

There was no necessity that the trial judge conduct an extensive hearing into the incident under these circumstances. His inquiries of the jurors were quite adequate under the circumstances for they elicited no information which would lead the Court to believe that there was any possibility that the jury had been prejudiced.** No further information would have been elicited from a full hearing on this issue as it was obvious that the jurors didn't know anything else.

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* Before the verdict, the Government had agreed that if a juror had observed appellant's arrest, a new trial would be appropriate. It had been agreed, however, that the inquiry would await a guilty verdict (685-686).

** Indeed, given the fact that juror number two, the juror who appellant's counsel initially represented that she had personally seen at the arrest site (686-687), had observed nothing, it is small wonder that Judge Bruchhausen was properly satisfied when no juror responded affirmatively to his inquiry. And, while appellant may speak of Judge Bruchhausen's "enigmatic" responses (Brief, p. 33), his abruptness with counsel may have been due to counsel's revelation shortly before that she had not been present when appellant was arrested (987; compare 686-687).

The cases relied on by defense counsel in making his claim that the defendant was entitled to a full hearing do not stand for that proposition. In *United States* v. *Nash,* 414 F.2d 234 (2d Cir., 1969), the trial court had voluntarily granted a hearing. Thus, this Court did not rule on the issue of the defendant's possible entitlement to such a hearing. The appeal simply dealt with an attempt by the defendant to expand the scope of the inquiry beyond the limits set by the trial judge. The appeals court in *United States* v. *Allison,* 481 F.2d 468 (5th Cir., 1973) remanded the case for a hearing as the trial judge had made *no inquiry at all* regarding possible prejudicial effect upon the jury due to the fact that the issue was being raised for the first time on appeal.

In the case at bar, however, it is clear that the trial judge adequately questioned the jury panel as to their possible knowledge. Consequently, his determination that the jurors had no such knowledge was a reliable one.

Thus it is clear that no purpose would have been served by conducting an extensive hearing on the issue and appellant's contention in this regard is without merit. And, as the questioning elicited no reasonable possibility that the jury had been prejudiced by the subsequent arrest, the verdict brought in by this jury should stand undisturbed.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

October 11, 1974

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* The United States Attorney's Office wishes to acknowledge the assistance of Ruth Beth Sobell and Carol A. Fine in the preparation of this brief. Mrs. Sobell and Miss Fine are third year students at Brooklyn Law School.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

MICHAEL MULQUEEN being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 15th day of October 19 74 he served two copies of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Sanford M. Katz, Esq.
640 Broadway
New York, N. Y. 10012

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Michael Mulqueen
MICHAEL MULQUEEN

Sworn to before me this

15th day of October 19 74

NANCE B. COHEN
Notary Public, State of New York
No. 24-0583965
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975